

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

FIRST ACT INC.

Plaintiff

v.

KIDZ TOYZ, INC. and
CHRISTMAS TREE SHOPS, INC.

Defendants

Civil Action No. 03-12507 EFH

**DECLARATION OF JAY MACKEN
IN SUPPORT OF FIRST ACT'S MOTION FOR PRELIMINARY INJUNCTION**

I, Jay Macken, declare as follows:

1. I am President of Dedicated Sales Co., Inc. Since 1998, I have been an independent sales representative for First Act Inc. assigned to cover the six New England states. As First Act's sales representative for New England, I work closely with First Act's management and sales team to place First Act products in stores and retail outlets throughout New England. It is my job to call on existing and prospective accounts (*i.e.*, the retailers) to interest them in carrying First Act products and to negotiate the deals with those accounts.

2. In January 2003, I called Christmas Tree Shops and asked to speak with a merchandise buyer. I was connected to Phil Carfagno, who told me he was a senior buyer for Christmas Tree Shops. I asked him to consider carrying a number of First Act items, including certain "opportunity" items. Opportunity items are closeouts or excess inventory that can be sold for reduced prices. I understood from my conversations with Mr. Carfagno that Christmas Tree

Shops specializes in such "opportunity" items and often purchases closeout and excess inventory and then sells the items at substantially below normal retail prices.

3. Mr. Carfagno asked me to e-mail or fax him a list or catalog of the items that I wanted him to consider. Accordingly, on or about January 20th, I emailed Mr. Carfagno a list of closeout and excess inventory that First Act was offering at the time. A copy of the "Closeout/Excess Inventory" list that I sent to Mr. Carfagno is attached as Exhibit A.

4. This list shows two Junior Quartet items, catalog numbers FP-405 and FP-406, although they are essentially the same product. The Junior Quartet is a boxed set containing a tambourine, triangle, and two jingle sticks. This boxed set is meant for children and is priced accordingly. As seen in the photo of the product, the box is open in the front. The tambourine sits in the middle of the box, flanked on either side by a jingle stick. The triangle sits in front of the tambourine and partially below it.

5. I understand that the Junior Quartet boxed sets were on closeout because First Act was then in the process of changing the color of the box (from yellow and purple to blue and white) and some of the copy printed on the box. Otherwise, the product and package configuration have remained the same--a tambourine, two jingle sticks, and a triangle arranged in exactly the same way in exactly the same shape and design of box.

6. After my initial telephone call with Mr. Carfagno, I had a couple of more phone or e-mail conversation with him about First Act products. Then, on Friday, March 21, 2003, I met with Mr. Carfagno at the Christmas Tree Shops offices in South Yarmouth, Massachusetts. At that meeting, Mr. Carfagno told me that he was interested in the Junior Quartet boxed set (catalog no. FP-405) and three other First Act items (Junior Maracas, Student Marching Drum, and Student Guitar). He said that Christmas Tree Shops carried other musical instruments for

children, such as a harmonica and a guitar and that these items sold very well, in very large quantities. Thus, I knew that Christmas Tree Shops would make a good retail outlet for First Act products and had the potential to move large quantities of them.

7. Mr. Carfagno told me that, as a trial, he would buy 1200-1500 of the Junior Quartet boxed sets and that, if they sold well, he would "import" much more, meaning he would order new boxed sets fresh from the factory in China (*i.e.*, first-run rather than closeout or excess inventory).

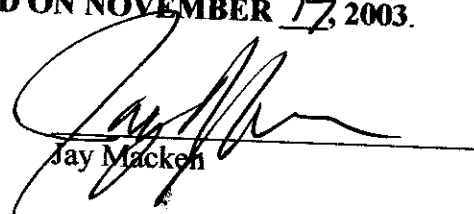
8. We then discussed the "deal price," meaning the price per unit that Christmas Tree Shops would pay to First Act (as opposed to the retail price that Christmas Tree Shops would charge its customers). We did not agree on a deal price that day.

9. At the end of our meeting on March 21st, I left Mr. Carfagno with samples of the Junior Quartet boxed set (FP-405) and the other items for which he had expressed interest. Attached as Exhibit B is a photograph of a Junior Quartet boxed set identical to the one that I left at Christmas Tree Shops that day.

10. In the weeks following our meeting, I spoke with or e-mailed Mr. Carfagno several more times regarding the deal price for the Junior Quartet. I also met Mr. Carfagno again at his office on or about June 27, 2003. In the end, First Act could not meet the very low price that Christmas Tree Shops wanted to pay for the Junior Quartet boxed sets.

11. I base the foregoing testimony on my personal knowledge.

I DECLARE UNDER THE PAINS AND PENALTIES OF PERJURY THAT THE FOREGOING IS TRUE AND CORRECT. SIGNED ON NOVEMBER 17, 2003.


Jay Macken

02202/00505 280215.1